No. 78-403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM J. SCOTT, In His Official Capacity As Attorney General Of The State Of Illinois,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Grand Jury Proceeding (Subpoenas Duces Tecum) Special April 1977 Session

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, William J. Scott, in his official capacity as Attorney General of the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 11, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto at pages A 1 - A 9. The opinion of the District Court, which is not reported, appears in Appendix A hereto at pages A 11 - A 28.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1978 (A1-A9). A timely petition for rehearing *en banc* was denied on August 11, 1978 (A10), and this petition was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Government, through its instrumentalities, the United States Attorney, the Grand Jury and the District Court, did, in contravention of the United States Constitution, wrongfully exercise the power of the United States in an instance where a use of that power was unnecessary to the accomplishment of any legitimate federal purpose?

2. Whether principles of Federalism prohibit the use of federal subpoenas which infringe upon the sovereignty of a State when the use of those subpoenas is unnecessary to accomplish a legitimate federal purpose?

3. Whether, in view of the directory mandate of the Illinois State Records Act, under the provisions of Rule 17(c) of the Federal Rules of Criminal Procedure as interpreted by this Court, as well as under the facts of this case, it was reversible error and an abuse of the federal judicial power for the Court of Appeals to affirm the District Court's judgment denying petitioner's Motion to Quash?

4. Whether, in view of the ready availability of State public records sought by the United States Attorney and a Federal Grand Jury, the District Court was presented with an actual, justiciable controversy within the purview of Article III, Section 2, of the United States Constitution, such as is necessary to validate any exercise of the federal judicial power, including the power to sustain Court process?

5. Whether an improper exercise of the federal judicial power may be validated upon a presumption, unsupported by a factual showing in the court record, that a constitutional officer of State government will fail to faithfully discharge and execute the duties vested in him by the Constitution, statutes and law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED*

United States Constitution

Article 3, Section 2

10th Amendment

Illinois Constitution of 1970

Article V, Section 1

Article V, Section 15

Statutes of the United States

Federal Rules of Criminal Procedure, Rule 17(c)

Federal Rules of Criminal Procedure, Rule 27

Federal Rules of Civil Procedure, Rule 44(a)(1)

Federal Rules of Evidence, Rule 902

28 U.S.C.A. § 1739

Illinois Statutes

Ill. Rev. Stat. (1977) Ch. 15 § 303-2

Illinois State Records Act, Ill. Rev. Stat. 1977, Ch. 116, §§ 43.4 - 43.28

* The Constitutional and statutory provisions recited herein are set forth in Appendix B of this Petition.

STATEMENT OF THE CASE

The present petition is filed by William J. Scott in his official capacity as Attorney General of the State of Illinois. While it involves federal grand jury subpoenas duces tecum for State Records, he is neither a witness nor a party to whom the challenged subpoenas were directed. No personal rights or privileges of petitioner are or ever have been asserted in this cause which relates solely to the rights of a sovereign state, its people, officials and employees.

On Friday, March 17, 1978, and Monday, March 20, 1978, a number of subpoenas duces tecum, which were issued from the Clerk of the United States District Court for the Northern District of Illinois, were served upon various employees of the State of Illinois who work in the office of the Illinois Attorney General. All of those subpoenas were addressed to the State employees at their official place of business; they commanded these State employees to appear before the Grand Jury on March 22, 1978, and to produce at that time a multitude of official records of the State of Illinois which, under the statutes of Illinois, may be inspected and copied at the office of the Attorney General; that office, under State law is required to maintain them. Also included in the subpoenas were other materials for which the use of subpoenas is not challenged.

The broad sweep and huge volume of the State Records demanded by those subpoenas is readily apparent from even a cursory examination of them. For example, they demand, among other things: records of all long distance telephone calls placed by the office of the Attorney General (including but not limited to bills, charges, identification of numbers called or called from, etc.) for a nine year period;

all records reflecting the identities and addresses of, and compensation paid to Special Assistant Attorneys General for a nine year period; listing of all employees of the Attorney General's Office (including salary, position and dates of employment) for an eight year period; and all diaries, appointment books, travel information, telephone directories or other compilations of telephone numbers maintained by, for, or in connection with the activities of the Attorney General for a nine year period.

Petitioner, in his official capacity as Attorney General of the State of Illinois, moved the District Court, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, to quash or, in the alternative, substantially modify these subpoenas. Although none of the challenged subpoenas was directed to him, petitioner, in his official capacity, brought a third party challenge asserting the rights of the State of Illinois, its people, officials and employees because under the Constitution and the pertinent statutes of the State of Illinois he, as the Attorney General of Illinois, is the only party legally authorized to represent these interests and has the responsibility and duty to do so.

Briefs were filed and argument was heard on an expedited schedude. At the arguments the United States Attorney recognized that the majority of the documents sought by the subpoenas (all of the documents to which Petitioner's challenge is directed) were available for inspection and copying under the Illinois Records Act [*Transcript of Proceedings* (hereinafter *Tr.*), *3-22-78* pp. 30, 31]. He conceded that, with respect to these State Records ". . . perhaps the subpoenas were unnecessary . . ." (*Id.* at p. 31), and stated that there was no constitutional issue if these documents could be had under State law (*Id.* at pp. 34-35).

The District Court suggested that the United States Attorney might withdraw the subpoenas and obtain the

information sought by him in conformance with the Illinois Statutes. The Court noted that if this were done there would be no issue as to them. However, the Court also noted that if the United States Attorney desired to use a subpoena, rather than proceed in conformance with State Law, then the use of the subpoena power was put at issue (*Tr. 3-22-78* pp. 34-35).

On April 5, 1978, the District Court denied Petitioner's motion to quash and allowed in part the motion to modify the subpoenas. The Court entered a minute order (Record Item 12, A 5) which showed that its Memorandum Opinion was embodied in the Transcript of Proceedings for April 5, 1978.

Petitioner immediately filed a Notice of Appeal, had the record certified and docketed, and moved for an expedited schedule for briefs and argument. Although the District Court had stated that if an appeal were perfected it would stay the subpoenas, upon the motion of the United States Attorney it denied a stay. On April 13, 1978, the Court of Appeals, upon a vote of two to one, denied petitioner's Motion for Stay. An application for stay was made to this Court and denied on April 14, 1978.

Although the subpoenas were complied with upon the denial of petitioner's application for a stay, the cause remained and continues to remain vital because the grand jury still possesses over twenty "bankers' boxes" (11" high X 15" wide X 24" long) filled with State Records from the Illinois Attorney General's Office plus State Records similarly obtained from other State agencies, and because of the explicit statement of the United States Attorney that the procedure of issuing subpoenas to State employees that command the production of State Records, which State law requires to be maintained by various State agencies, will continue (A3).

On July 11, 1978, the Court of Appeals affirmed the District Court Judgment (A1-A9) and on August 11, 1978, Petitioner's timely filed Petition for Rehearing was denied (A10).

REASONS FOR GRANTING THE WRIT

The present case, which involves the relationship between the federal government and the states, albeit in a novel setting, not heretofore determined by this Court, has been decided by the lower courts in a manner which is destructive of the basic tenets of that relationship, as declared and visualized in the Federal Constitution and interpreted by this Court. The core question of the controversy concerns the principle of Federalism as it finds expression in the necessary sensitivity which the federal government must display toward the legitimate interests of each state forming part of this Union. In the case at bar, the federal government, taking the stance of a prosecutor, has acted in callous disregard of that sensitivity standard laid down by this Court in *Younger* v. *Harris,* 401 U.S. 37, 27 L. Ed 2d 669, 91 S. Ct. 746 (1971), and the various cases following and refining the *Younger* concept.

Many years ago, Mr. Justice Holmes declared that "[n]o distinction can be taken between the Government as prosecutor and the Government as judge." (*Olmstead* v. *United States,* 277 U.S. 438 at 470 (1928)). Yet, in the instant case, such improper distinction has been taken by the lower courts. It is respectfully submitted that this erroneous distinction ought to be corrected by this Court since it affects not only the traditional aspects of the sovereignty of the State of Illinois, but also that of all other states of the Union.

The gravamen of the challenge presented is abuse of judicial process—an unreasonable and wrongful insistence

on the part of the federal government to use court process where none has been necessary, thereby leading to a needless confrontation with a sovereign state of this Federal Union. The challenge does not relate to the ultimate reach of federal power where it is needed to accomplish a legitimate governmental purpose, but rather to the unnecessary use and effectuation of that power in a system which honors the concept of dual sovereignties. No personal rights are asserted herein nor made the subject of these proceedings; rather, this case raises issues relating solely to the rights of the State of Illinois as a sovereign.

The United States Attorney, in a grand jury investigation allegedly against the Attorney General of the State of Illinois for possible income tax violations, caused subpoenas duces tecum to be issued against various State employees for the production of official State records, although these records were readily available under the pertinent provisions of the Illinois State Records Act. Illinois law requires that its records must be maintained by the various State offices to which they pertain and may be viewed and photocopied at those offices. (Illinois Constitution (1970) Article V, §§ 1, 15; Ill. Rev. Stat. (1977), ch. 116, §§ 43.6, 43.7). The removal of over twenty "bankers' boxes" (11" high x 15" wide x 24" long) filled with State Records—most of them originals—from the Office of the State's chief legal officer, plus the removal of additional State Records similarly subpoenaed from other State Officers and Agencies, obviously interfered and continues to interfere with the orderly conduct of the State's business. For example, the removal of these State Records from their proper depositories is impairing the Illinois Auditor General who is currently attempting to conduct an audit which is required by Ill. Rev. Stat. (1977), ch. 15, § 303-2.

The United States Attorney conceded in open court that the State Records subpoenaed were available for inspection and copying under the Illinois Records Act (*Tr. 3-22-78*, pp. 30, 31). Copies of the State Records involved herein are admissible in any federal court (Fed. Rules Cr. Proc. Rule 27, 18 U.S.C.A.; Fed. Rules Civ. Proc. Rule 44, 28 U.S.C.A.; Fed. Rules Evid. Rule 902, 28 U.S.C.A.; 28 U.S.C.A. § 1739). Yet depite these facts the United States Attorney insisted upon the maintenance of the subpoenas.

The Court of Appeals, in sanctioning the subpoenas, noted that "... it may have been more seemly for the United States Attorney to seek to use the State Records Act before resorting to a subpoena ..." (A8), but opined that failure to quash the subpoenas was not an abuse of discretion because of "... the necessity that some sensitivities be implicated in almost any grand jury investigation."

The Opinion of the Court of Appeals misapprehends the basic principle of Federalism and its application to the instant case. The "sensitivities ... implicated" in the present case are not those of individuals, but rather the sensitivities which the federal government, under the principle of Federalism, must display and observe vis-a-vis the legitimate sovereign interests of the State. That display of sensitivity is not a matter of discretion, as wrongly considered by the Court of Appeals; rather, it is a matter of constitutional mandate which the duality of the federal-state sovereignty imposes upon, and exacts from, the federal government. United States Constitution, Tenth Amendment.

The State of Illinois, by enacting a valid statute designed to safeguard, regulate and afford speedy access to its official records, has acted within the legitimate sphere of its sovereign rights, which must be respected by the federal government. This holds particularly true in the present

case since the interests and goals of the federal government in securing access to the information contained in the State's official records are in no way impaired or hindered by complying with the provisions of the Illinois Records Act. In short, the grand jury's search for the truth will not be impeded by the use of the Illinois Records Act. When the dearth of federal need for these subpoenas is counterpoised against the legitimate right of the sovereign to its own records, the scales are obviously weighted heavily in favor of the State's interest. Under the posture of the present case, to insist upon the maintaining and upholding of the unnecessary subpoenas can be categorized only as an unwarranted and crass interference with the sovereign rights of the State of Illinois.

The Court of Appeals misapprehended the legal distinction between State Records and private records and overlooked the federal statutes which recognize this distinction. Unlike copies of private records, as previously mentioned, copies of State Records are admissible in any federal court. (Fed. Rules Cr. Proc. Rule 27, 18 U.S.C.A.; Fed Rules Civ. Proc. Rule 44, 28 U.S.C.A.; Fed Rules Evid. Rule 902, 28 U.S.C.A.; 28 U.S.C.A. § 1739).

This Court held in the recent case of *Nixon* v. *Warner Communications, Inc.*, —— U.S. ——, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978), that when the legislature established a procedure for obtaining materials belonging to the Government, the materials had to be obtained, not by court order, but by following the statutory procedure. Although the records act involved in that case was a federal statute, this Court, significantly, citing as an example the very same Illinois Record Act involved in the instant case, stated:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents ... (*Id.* at 55 L. Ed. 2d 579).

The legal principle, although appearing in the *Warner Communications* case in a novel form, has been recognized since the early years of our nationhood. Thus, in *Delaney* v. *Regulators of the City of Philadelphia,* 1 Yeates (P.A.) 403 (1794), the court held that a custodian of public documents will not be required to bring them into court under a subpoena duces tecum where official copies can be had. Considering this principle, the contrived distinction which the Court of Appeals has attempted to draw is without legal significance.

Under these circumstances, it is apparent that the United States Attorney, as well as the lower courts sanctioning his actions, have violated the most basic principle of Federalism, namely, that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States". (*Younger* v. *Harris,* 401 U.S. 37, 27 L. Ed. 2d 669 at 676, 91 S. Ct. 746 (1971)). Here there has been such an undue and unnecessary interference with the legitimate activities of the State. That needless interference, which has left the State of Illinois formally intact but functionally impaired, has been exacerbated by the fact that the State employees, against whom the federal subpoenas for the production of the State records were directed, have been subjected to a Hobson's choice; production of the State records in compliance with the federal subpoenas has been in direct contravention of the removal proscription of the State Records Act which subjects each person acting in violation of those provisions to criminal punishment. To force a person, and especially a State employee, by using the totally unnecessary federal subpoena process, to act in contravention of a valid State statute, is not only morally wrong, but also, and more importantly, under the circumstances prevailing here, constitutionally impermissible.

Significantly, the United States Attorney, by ignoring the means and methods of a clear State statute, has not only conjured up a completely unnecessary federal-state confrontation, but has also imposed upon the State the costs incident to the production of these materials. By subjecting the State to those costs relating to a *federal* grand jury investigation conducted against an individual, the United States Attorney has in fact imposed a tax upon the State—an imposition constitutionally prohibited and totally unnecessary.

Additionally, there is grave doubt whether the subpoena process utilized in the present case may be considered to be constitutionally permissible from a jurisdictional point of view. Subpoenas are judicial orders; they are mandates issued under the seal of the District Court by the Clerk thereof. *Bowles v. Gantner & Mattern Co.,* 64 F. Supp. 383 (N.D. Cal. 1946). In order to be valid as judicial commands, the court issuing them must have proper jurisdiction. Under Article III, Section 2, of the United States Constitution, the jurisdiction of federal courts is limited, among other things, "to controversies to which the United States shall be a party."

Since the United States Attorney acknowledged that the federal purpose (access to the information sought) could have been accomplished without resort to the subpoena process, it is highly doubtful whether there was a "controversy" in the constitutional sense, authorizing the issuance of the subpoenas. While there was disagreement regarding the procedure for the obtaining of State Records, such disagreement did not rise to the dignity of a "controversy" within the contemplation of the Constitution. In

United States v. *Nixon*, 418 U.S. 683, 696, 41 L. Ed. 2d 1039, 1057, 94 S. Ct. 3090 (1974) this Court stated:

> In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve.

The wrongfulness of the subpoena process employed in the present case becomes even more pronounced if the pertinent provisions of Rule 17(c) of the Federal Rules of Criminal Procedure are considered. The rule provides that a subpoena for documents may be quashed if their production "would be unreasonable or oppressive". This Court, in interpreting the latter term, adopted the formulation of Judge Weinfeld in *United States* v. *Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952), that the party using the subpoena process must show, as one of the prerequisites for the validity of the subpoena, that the documents sought by the subpoena "are not otherwise procurable reasonably in advance of trial by exercise of due diligence". (418 U.S. at 699).

As previously emphasized, the documents involved here were readily procurable without resorting to the subpoena process which was therefore unreasonable and oppressive, hence in direct contravention of the principles laid down by this Court. It should be stressed that the aforementioned statement of this Court was clear and concise and did not leave room for any qualifications read into it by the Court of Appeals. Additionally, as previously mentioned, in the subsequent case of *Nixon* v. *Warner Communications, Inc.*, —— U.S. ——, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978), this Court further confirmed this principle when it held that judicial process was an inappropriate manner for obtaining governmental records when there was a legislative procedure for obtaining them.

Moreover, the oppressiveness of the subpoena process was highlighted by the fact that reams of documents had to be produced by the state employees—a task which took literally days of work, thus diverting the employees from fulfilling their regular duties. The erroneous statement in the Court of Appeals opinion regarding the speed and ease with which the subpoenas "apparently [!] were complied", lacks any factual basis in the record and is controverted by the sheer volume of documents which had to be produced, filling more than twenty large boxes.

The just-mentioned conjectural statement made by the Court of Appeals, in attempting to lend substance to its opinion, stands not alone. It must be emphasized in this connection that the present proceedings *relate solely to official records of the State of Illinois,* whose production has been sought by the United States Attorney through the utilization of the subpoena process. There has never been any claim or contention made by petitioner throughout these proceedings that any of his personal papers, such as campaign contribution records, are involved in the present proceedings. Thus, any reference to those papers in the opinion of the Court of Appeals is misleading and improper.

It must also be stressed that petitioner never contended that official State Records were immune from federal scrutiny, except that in the beginning of the proceedings, the argument was raised that *State Records revealing an informer's identity* were privileged communications. However, that argument was dropped when the United States Attorney declared that the identity of informers was irrelevant to the grand jury's inquiry, and disclosure of their identity was not intended to be compelled. (See *Tr. 3-24-78*, p. 7). That fact was later confirmed in the United States Attorney's Brief (p. 3, footnote 1).

Similarly, the Court of Appeals' statement regarding the right of the grand jury to every man's evidence finds no application in the present case since Petitioner does not dispute the right to the information sought or the right to use subpoenas ad testificandum, but only challenges the use of subpoenas duces tecum which command State employees to remove State Records from their lawful depositories.

Thus, with the exception of the issue of whether the District Court had jurisdiction to issue subpoenas for State Records which were readily available, the only issue before the Court of Appeals for determination was whether the federal subpoena process could and can continue to be used to obtain official State Records when those records can be easily and speedily obtained upon the asking and in pursuance of the swift and effective provisions of the Illinois Records Act.

The Court of Appeals, after having devoted a great part of its opinion to the problem of immunity of State Records from federal scrutiny—a question which, as just indicated, was not before the Court—finally turned its attention to the utilization of the federal subpoena process in relation to the State Records Act, denying that the subpoena process was unreasonable and improper. As previously emphasized, that decision was erroneous. It was based upon a misapprehension of law and fact and was in direct contradiction of the guiding principles enunciated by this Court.

Thus, the principal justification given by the Court of Appeals in upholding the supposed legality of the subpoena process and denying the adequacy of the Illinois Records Act, was grounded upon the strange speculation that petitioner, in his capacity as Attorney General of Illinois, might pick and choose those official documents which he would

make available under the Records Act. In the first place, the subpoenas were issued both to employees in the Attorney General's Office and employees in other State agencies not under the jurisdiction of the Attorney General, and the United States Attorney has indicated that similar subpoenas will continue to be issued in the future (A3). Secondly, and more importantly, to assume that a public official would act in violation of his public duties flies in the face of well-established principles of law enunciated by this Court (*County of Pendleton* v. *Amy,* 80 U.S. 297, 20 L. Ed. 579 (1872)), and heretofore adhered to not only in the Seventh Circuit [*Hull* v. *Continental Illinois National Bank & Trust Co.,* 177 F. 2d 217, 220 (7th Cir. 1949); *United States ex rel. Adamantides* v. *Neely,* 191 F. 2d 997, 999 (7th Cir. 1951)], but in other circuits as well (*e.g., Alfred Knopf, Inc.* v. *Colby,* 509 F. 2d 1362, 1368 (4th Cir. 1975), cert. denied 421 U.S. 992; *Kephart* v. *Richardson,* 505 F. 2d 1085, 1090 (3rd Cir. 1974); *Continental Bank and Trust Co.* v. *Brandon,* 297 F. 2d 928, 932 (5th Cir. 1962); *Goldberg* v. *Truck Drivers Local Union No. 299,* 293 F. 2d 807, 812 (6th Cir. 1961) cert. denied 368 U.S. 938). To controvert the presumption that a State official will honestly and faithfully perform his duty by a mere conjecture that he might act dishonestly, as the Court of Appeals has done in the present cause, conflicts with the holdings of this Court and creates a conflict between the circuits, which, it is respectfully submitted, this Court ought to resolve because it carries with it, an impact that transcends the limits of this case.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 78-1459

In the Matter of

THE SPECIAL APRIL 1977 GRAND JURY
Appeal of WILLIAM J. SCOTT, Witness.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 77-GH-2042—**James B. Parsons**, *Judge.*

HEARD JUNE 14, 1978—DECIDED JULY 11, 1978

Before CUMMINGS, SPRECHER and BAUER, *Circuit Judges.*

PER CURIAM. Appellant Attorney General William J. Scott is the subject of a federal grand jury investigation. On March 17 and 20, 1978, grand jury subpoenas *duces tecum* were served upon five members of his staff, calling for the production of his campaign records, employee rosters, his travel records, and long distance telephone bills. On March 22, appellant "in his Official Capacity of Attorney General of the State of Illinois" moved to quash or modify those subpoenas on seven different grounds. On March 24, Chief Judge Parsons of the Northern District of Illinois advised counsel of his tentative conclusion that these subpoenas were enforceable.

On March 28, an Assistant United States Attorney responded to the appellant's motion to quash or modify the subpoenas by filing an affidavit and certain exhibits *in camera*. Another affidavit of the same date described the conversations the prosecutor had with the five

subpoenaed persons or their counsel and portrayed the ease of compliance.

On April 5, Judge Parsons modified the subpoenas to the extent that they may have covered the contents of telephone conversations and official meetings, but the motion to quash was denied, resulting in appellant's filing a notice of appeal. Stays were denied by the district court, this Court and the Supreme Court, and the subpoenas, including two additional ones served on April 6th, were complied with during the week of April 17.

I. *Mootness*

In the last portion of its brief on appeal, the Government claim that the issues raised by the appeal are moot because of the compliance with the subpoenas. Of course it is an empty gesture to "quash" a subpoena already honored (see *United States* v. *Johnson,* 215 F. Supp. 300, 318 (D. Md. 1963), affirmed and remanded on other grounds, 337 F. 2d 180 (4th Cir. 1969), affirmed on other grounds, 383 U.S. 169) but the case still may be justiciable if the controversy is capable of repetition, yet evading review. See, *e.g., Moore* v. *Ogilvie,* 394 U.S. 814; *United States* v. *W. T. Grant Co.,* 345 U.S. 629.

Both parts of this mootness standards as recently articulated by the Supreme Court appear to be met here. See *First National Bank of Boston* v. *Belotti,* —— U.S. ——, ——, 46 LW 4371, 4374; *Weinstein* v. *Bradford,* 423 U.S. 147, 149. First, as the dates outlined above indicate, the challenged action was too short to be litigated fully prior to appellant's compliance. While it could be argued that appellant could have obtained review before compliance by refusing to supply the documents and appealing a subsequent finding of contempt, the Supreme Court has not required litigants to subject themselves to contempt or criminal sanctions in order to meet this prong of the mootness test. See, *e.g., Nebraska Press Association* v. *Stuart,* 427 U.S. 539; *First National Bank of Boston* v. *Bellotti, supra.*

The second prong of the test is that there is a reasonable expectation that the same complaining party will be subjected to the same action again. That prong is satisfied here because as we were advised at oral argument this subpoena is part of a continuing investigation and future subpoenas of state officials, including the Attorney General's office, subject to the same objection are likely. Compare *Securities and Exchange Commission* v. *Sloan,* —— U.S. ——, 46 LW 4426.

II. *Immunity and Privilege*

Appellant's first attack on the subpoenas is that they represent an unconstitutional federal "excursion" into the territory of exclusive state sovereignty, apparently on the grounds that certain state functions are immune from subpoena and certain state records are privileged from subpoena. We disagree. *Branzburg* v. *Hayes,* 408 U.S. 665, 668, emphasized the public right to obtain every man's evidence through grand jury proceedings, and *United States* v. *Nixon,* 418 U.S. 683, 709-710, noted that the process for the production of evidence has only limited exceptions which are "not lightly created nor expansively construed * * *."

Nothing in the United States Constitution immunizes any "exclusive domain of the state" (Br. 24) from the reach of a federal grand jury, and appellant has cited no case recognizing any such immunity. Compare *Pitcher* v. *United States Attorney,* 199 F. Supp. 862 (E.D. La. 1961); *Touhy* v. *Ragen,* 340 U.S. 462, 470 (Frankfurter, J., concurring). As then-Judge Webster's recent discussion of the grand jury's power with respect to the Sioux Indians indicates, the existence of some degree of sovereignty does not excuse a state from its responsibility to provide evidence to the grand jury. See In re *Long Visitor,* 523 F. 2d 443, 446 (8th Cir. 1975); cf. *Martin* v. *Hunter's Lessee,* 1 Wheat. 305. Rather than carving out an unprecedented exemption from an arm of the federal government's enforcement power, the requisite deference to a state's needs can be applied by considering with some care whether those

needs are sufficient to create a privilege for certain state records. Compare *United States* v. *Burr*, 25 Fed. Cas. 30, 35 (1807); *United States* v. *Nixon*, 418 U.S. 683.

Certainly the Tenth Amendment and *National League of Cities* v. *Usery*, 426 U.S. 833, do not justify a contrary result. The federal interest in obtaining evidence in order to enforce its criminal laws against individuals is of an entirely different class from the interest asserted in Usery, while Congress sought "to regulate directly the activities of States as public employers * * *" (at 841). As discussed below, the impact of a subpoena on state functions is markedly different from the *Usery* direct system of regulation that requires a reallocation of state resources. Accord, In re *Grand Jury Proceedings*, 563 F. 2d 577 (3d Cir. 1977);[1] cf. *National League of Cities* v. *Usery*, 426 U.S. 833, 856 (Blackmun, J., concurring). This distinction is particularly applicable here because this grand jury has not embarked on a "grandiose, brazen fishing expedition * * * into the affairs of the State of Illinois" (Br. 24) but rather is concerning itself with appellant's own affairs. To paraphrase from Judge Swygert's recent opinion in *Marshall* v. *City of Sheboygan*, —— F. 2d —— (7th Cir. No. 77-1272 decided May 24, 1978), "enforcement of the * * * [subpoenas] against the States and their subdivisions will not '[impair] the States' integrity or their ability to function effectively in a federal system' " (slip op. 11).[2]

Nor should these record be privileged from disclosure. As a general matter, courts consistently have rejected the view that state records are privileged from disclosure (see, *e.g.*, In re *Grand Jury Proceedings*, 563 F. 2d 577 (3d Cir. 1977); see generally *Matter of Grand Jury Impaneled January 21, 1975*, 541 F. 2d 373 (3d Cir. 1976)), even in cases

1. There the court recognized only a federal common law privilege of state legislators, in accord with *United States* v. *Craig I*, 528 F. 2d 773 (7th Cir. 1976), but rejected in *United States* v. *Craig II*, 537 F. 2d 957 (7th Cir. 1976) (*en banc*), certiorari denied *sub nom. Markert* v. *United States*, 425 U.S. 973.

2. Quoting *Fry* v. *United States*, 421 U.S. 542, 547 n. 7.

in which state law prohibited the disclosure of the records. *E.g.*, In re *New York State Sales Tax Records*, 382 F. Supp. 1205, 1206 (W.D. N.Y. 1975).[3] Where, as here, the State argues that at least some of the records are required to be disclosed rather than suppressed under state law, it is difficult to imagine how these precedents can be avoided.

More specifically, appellant offers no reason beyond the supposed exclusivity of the sovereign under *Younger* v. *Harris*, 401 U.S. 37, why a privilege is needed for these documents or why a privilege is appropriate under the Federal Rules of Evidence standard of developing privileges by resort to "principles of the common law as * * * interpreted in the light of reason and experience."[4] For example,

3. If any records whose disclosure is prohibited by Section 11 of the Illinois State Records Act (Ill. Rev. Stats. (1977) ch. 116 §§ 43.4, 43.14) are included in the records subpoenaed, we agree with Judge Curtin that the Supremacy clause requires their disclosure to the grand jury unless the materials are otherwise privileged. 382 F. Supp. 1205. This requirement is particularly justifiable in light of Section 11's explicit recognition, similar to the New York statute, that the restriction against disclosure is not absolute. Section 11 provides:

> "All records made or received by or under the authority of or coming into the custody, control or possession of public officials of this State in the course of their public duties are the property of the State and shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, *except as provided by law.*" (Ill. Rev. Stats. (1977) ch. 116 § 43.14) (emphasis added).

4. Rule 501 of the Federal Rules of Evidence provides:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

there is no reason to expect that any worthwhile conduct will be deterred if employee rosters are disclosed. Any unfortunate results of the disclosure of remaining types of items such as travel records, lists of telephone calls (as opposed to their substance) or campaign records pale by comparison to the hazards unsuccessfully claimed in an attempt to quash the subpoena in *United States* v. *Nixon*, 418 U.S. 683; cf. *Buckley* v. *Valeo*, 424 U.S. 1. Since the Government does not seek "confidential communications, informant identities and the contents of case files" (Govt. Br. 12 n. 10), appellant's use of this justification for a privilege is misplaced (Br. 47-50; but see Reply Br. 11). In light of the relative unimportance of the need to make the documents privileged, the "two-fold aim of criminal justice—that guilt shall not escape nor innocence suffer"—demands that these items be available to the grand jury. See *Matter of Grand Jury Impaneled January 21, 1975*, 541 F. 2d 373, 382 (3d Cir. 1976).

III. *Reasonableness of the Subpoenas*

Next appellant offers several reasons why the subpoenas should be quashed under the limitation in Rule 17(c) of the Federal Rules of Criminal Procedure on "unreasonable or oppressive" subpoenas. The argument that compliance is oppressive is virtually frivolous, for, as already noted, the persons subpoenaed already have complied with the requested documentary production. The Government has not complained that the compliance was deficient and the speed and ease with which the subpoenas apparently were complied belies any claim of oppressiveness. See generally *Brown* v. *United States*, 276 U.S. 134, Nor were the subpoenas oppressive because, as claimed at oral argument, the original documents turned over to the grand jury are needed for auditing purposes. First, the Government responded that it was making (and had made known its willingness to make) needed original documents available to the State. Second, despite his counsel's oral assertion

here, appellant made no showing whatsoever in the court below that the absent subpoenaed documents would have a deleterious effect on the functioning of any state office. Finally, even if true, a claim of disruption caused by record production does not preclude compliance with a grand jury subpoena. See *Matter of Grand Jury Impaneled January 21, 1975*, 541 F. 2d 373 (3d Cir. 1976).

The contention pressed most vigorously by appellant on this appeal is that some of the documents were available through a request under the Illinois State Records Act (Ill. Rev. Stats. (1977) ch. 116, §§ 43.4 *et seq.*), so that requesting them by subpoena is unreasonable and oppressive. The Records Act provides that certain state records "are public records available for inspection by the public." *Id.* § 43.6. Relying on Judge Weinfeld's formulation in *United States* v. *Iozia*, 13 F.R.D. 335, 338 (S.D. N.Y. 1952), recently repeated by the Supreme Court in *United States* v. *Nixon*, 418 U.S. 683, 699, appellant argues that "in order to require production prior to trial, the moving party must show * * * that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence." It is also asserted that use of the State Records Act is particularly appropriate under *Younger* v. *Harris*, 401 U.S. 37, because that case purportedly established that the federal government has a special duty to avoid such unreasonable interference in the state's affairs.[5]

Initially, however, it does not appear true that most of the subpoenaed documents are available under the Act, or that the remainder can be procured under reasonable terms. Even appellant admits that many of the documents, such as campaign information, would be unavailable under the Act. As to the remaining documents, the Act provides

5. *Nixon* v. *Warner Communications*, —— U.S. ——, 46 LW 4321, is of no solace to appellant despite his insistence that it establishes the need to use an available statutory plan rather than court process. The dispute there was over public access to items already subpoenaed and did not involve the power to reach evidence by subpoena.

that they cannot be viewed if they are then being used by state officials (§ 43.6). Also, the Act does not permit the originals to be removed (§ 43.7) and even allows the state official discretion to permit viewing only of copies (*id.*). Of course the Act provides no mechanism by which a requesting party can guarantee that there was full compliance with its request.

Even assuming that the Act theoretically may be sufficient in some cases, applying it to these unique circumstances would permit the Attorney General to control the release and availability of documents under the Act (§ 43.6; see ch. 14 § 4). Apart from the justifiable doubt of full compliance that the Government would have without the force of a subpoena when the purported subject of the investigation would choose what documents to release, requiring pursuit of this alternate method of procurement is not justified anyway by the rationale of Judge Weinfeld's rule in *Iozia*. As that rule has been applied, it is used to avoid allowing a party who may have the needed document in its own possession, or could easily obtain it from another source, to force the subpoenaed party to bear the costs of searching for the document. Placing such a burden on the subpoenaed party when another source is available is deemed unreasonable and oppressive. See, *e.g.*, *United States* v. *Cohen*, 15 F.R.D. 269 (S.D. N.Y. 1953); *United States* v. *Schine*, 126 F. Supp. 464 (W.D. N.Y. 1954); *United States* v. *Duncan*, 22 F.R.D. 295 (S.D. N.Y. 1958); *United States* v. *Woodner*, 24 F.R.D. 33 (S.D. N.Y. 1959). In fact, in extrapolating on the rule in *Nixon*, the Supreme Court described it as asking whether "the subpoenaed materials are not available from any other source." 418 U.S. at 702.

When put in this context, the inapplicability of the rule here becomes apparent. It is not denied that the obligation to search for and produce the documents falls on the Attorney General's office whether or not a subpoena is used. The argument that the Act should have been used is therefore not the accepted argument that the subpoena places an unduly oppressive burden on the appellant but rather essentially is a claim that using a subpoena instead of the Act is not the most sensitive manner of proceeding and that it therefore is inconsistent with some penumbra of "Our Federalism." While it may have been more seemly for the United States Attorney to seek to use the State Records Act before resorting to a subpeona, given the potential problems with compliance under the Act, the inapplicability of the Act to many of the documents sought, and the necessity that some sensitivities be implicated in almost any grand jury investigation (compare *United States* v. *McGrady*, 508 F. 2d 13, 18 (8th Cir. 1974), certiorari denied, 420 U.S. 979), we cannot say that it was an abuse of discretion not to quash the subpoenas on this ground. See *United States* v. *Nixon*, 418 U.S. 683, 702. It should be noted that the Third Circuit already has held that it was not an abuse of discretion to hold that the grand jury's investigative interests outweigh a similar state "comity" concern. *Matter of Grand Jury Impaneled January 21, 1975*, 541 F. 2d 373, 377-378 (3d Cir. 1976).

Our examination of the documents submitted to the district court *in camera* satisfies us as to the relevancy and materiality of the information sought.

Orders affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
August 11, 1978
Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

In the Matter of SPECIAL APRIL 1977 GRAND JURY Appeal of WILLIAM J. SCOTT, Witness No. 78-1459	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 77-GJ-2042 James B. Parsons, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Witness William J. Scott, no judge in active service* has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Judge Harlington Wood, Jr. did not participate in consideration of this petition.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Name of Presiding Judge, Honorable James B. Parsons.

Cause No. 77 GJ 2042. Date: April 11, 1978

Title of Cause In re: Special April 1977 Grand Jury.

* * *

Pursuant to the Court's oral memorandum opinion and order [of April 5, 1978], motion to modify subpoenas allowed in part. Motion to quash subpoenas denied. Subpoenas as heretofore modified are returnable April 12, 1978 at 3:00 p.m.

s/ JBP

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re.

THE SPECIAL APRIL 1977 GRAND JURY } No. 77 GJ 2042

TRANSCRIPT OF PROCEEDINGS
Before
HON. JAMES B. PARSONS
Chief Judge
April 5, 1978
2:25 o'clock, p.m.

PRESENT:
MR. SULLIVAN
MR.MARGOLIS
MR. HERZOG

THE CLERK: 77 Grand Jury 2042, In re. The Special April 1977 Grand Jury; ruling on movant William J. Scott's, Attorney General of the State of Illinois, motion to quash or modify subpoenas.

THE COURT: I want to thank you gentlemen. You may wish to be seated because it takes me a few minutes to read what I have. I want to thank you for responding to my request that we assemble at two o'clock today. I have to leave the city for a couple of days. I didn't want to ask you to return after I have returned. I want to thank you also for your indulgence and patience in awaiting my later arrival here than two o'clock. Part of it, I assure you, is due to the

difficulty of getting here from within the building, from the 25th floor to this floor, by judicial routes that are devious and occasionally I discover that though I might wish to do so, the elevator doesn't run both directions at the same time.

I have a memorandum here but this is not a final and appealable order, and, for that reason, the memorandum merely explains what I do and does not go into the full length of the legal merits, what I would do as I would in a final and appealable order. For there to be a final and appealable order there would have to be a rule to show cause on a failure to obey the subpoenas.

Now, the movant here is the Attorney General of the State of Illinois. He is not the person subpoenaed but because of the nature of the subpoena he has standing to object to compliance with the terms thereof. In his motion to quash or modify certain subpoenas served upon personnel of his staff, the Attorney General of the State of Illinois, the Honorable William J. Scott, notes that the subpoenas cover a full range of official and privileged documents and papers maintained in his office covering the entire period of his service as Attorney General and that the materials sought are exempt because of a privilege running to his office as a constitutional officer of a sovereign state, as well as a privilege running to the people of the State of Illinois such as that recognized in the lawyer-client privilege common to our profession that excludes confidential communications between attorney and client, a privilege well recognized by law.

He further indicates that the subpoenas are overbroad and unreasonably interfere with the duties of his office.

I have reviewed the subpoenas on their face and find in certain respects that some of them have technical errors that can be corrected by modifications and that some of

them lack some of those restraints which protect the grand jury subpoenas from the overbreadth attack. These fallacies of overbreadth, not uncommon where there is a persistent belief that there are no restraints to which a grand jury must yield or where there is inadequate attention addressed to the principle of draftsmanship, but even these fallacies can be corrected by modification of the subpoenas.

The suggestion that a federal grand jury has a fundamental right to the testimony of anyone and that the subpoenas of the federal grand jury may command without restraint everyone and everything reflects a general principle without the exceptions.

Under our Constitution no authority is absolute and the grand jury, like all other vested authorities, must under many circumstances yield to the rights and privileges which so deeply are ingrained in our system and traditions as to be ranked as fundamental.

For example, grand jury subpoenas may not invade the privacy of individuals in violation of their rights under the Fourth, Fifth and Sixth Amendments. Those include the right that searches and seizures be reasonable, that judicial process answer to the requirements of due process of law, that the right against self-incrimination under the Fifth Amendment may be asserted and respected when so asserted by the person himself or herself being subpoenaed to not produce that which would tend to incriminate such person, and the Sixth Amendment right to effective counsel, out of which, of course, grows the attorney-client and work product privileges.

It should be noted parenthetically that the Fifth Amendment right is a personal right to the witness; it cannot be asserted by the third party in his own interest when he is not the person subpoenaed, but the third party intervenor is free to assert the other rights which are fundamental in

the Constitution and its Amendments if he has standing to intervene.

It is fundamental that a grand jury is not a research investigative body, like an overseer, throwing its light over everything with a view toward finding anything that might constitute a violation of law. It is not a policing agency. It is not an investigative agency of the Executive Branch of the Government in the usual use of that term, such as is the Federal Bureau of Investigation or the Secret Service or the Special Agents of the Internal Revenue Service. It is indeed a part of the judicial branch of the government with the primary responsibility of standing as a screen between the Executive Branch and the people to see that a citizen is not formally charged with a crime where there is no evidence whatsoever that he committed the crime.

The Constitution makes the product of the grand jury's work a right inuring to the people themselves. Its special constitutional recognition is in the Fifth Amendment, which provides that no person shall be caused to answer to an infamous crime, that is to say, a felony charge, except upon the presentment of a grand jury.

In pursuit of the performance of that service to the people and throughout its history grand juries have been accorded powers commensurate with their responsibility to pursue a preliminary but formidable charge to determine whether or not there is anything to it, and in the pursuit of this responsibility the federal grand jury subpoena must be answered wherever, in the absence of the constitutional restraints I have enumerated, it addresses itself.

The real and substantial issue raised by the Attorney General in this motion to quash, however, is another. It is whether or not the subpoena of the grand jury of this court may reach into the record of a department or an

agency or a corporate entity of the State of Illinois. This brings into focus not the issue in the Nixon case regarding the separation of powers between the three branches of government and the privilege, if any, that exists in the executive brach to an independent determination of what it will disclose to this arm, that is, the grand jury, of the judicial branch; this case brings into focus the powers of the grand jury to read into the records and documents and activities of the government of one of the states, that is, it brings into the foreground the meaning of the Ninth Article of the Constitution guaranteeing the states of our Union a republican form of government and the meanings of the Tenth Article of the Constitution reserving all but the powers expressly granted to the Congress in Article I of the Constitution to the states or to the people separately and respectively.

Some of the language in *U.S.* v. *Nixon* has been helpful to me in coming to a conclusion on that issue, but I have been primarily assisted by returning to some of the early cases under the Constitution decided under Chief Justice John Marshall regarding state and federal rights, cases deciding the issue of federalism, such as *Marbury* v. *Madison,* citation; *McCollough* v. *Maryland,* citation, and *Gibbons* v. *Ogden.*

These, I acknowledge, also were referred to by Judge Sirica in his decision in the Nixon case and alluded to in the appeal decisions in that same case by the higher courts. More recently I cite other cases which will be in the written form of this opinion which support my position here.

I am convinced, as I already have preliminarily indicated to counsel for both sides, that the state sovereignty principle does not serve to protect documents of the State of Illinois or of its officers in their official capacity from

the grand jury subpoena of this court, nor, of course, privileged documents of any person, including an officer of the State of Illinois, which for any reason are left in or are found to be in the possession of the state or of its agents.

Therefore, there is nothing in the state sovereignty concept that would prevent the subpoenas from being served and enforced.

As to the question of the attorney-client privilege between the people of the State of Illinois and their lawyer, the Attorney General, easily referred to as the attorney-client privilege, I find because of certain small modifications I make in these subpoenas that I need not address this issue with those minute modifications. The question does not exist, and I feel that this decision is not the proper place, therefore, to reach that more difficult question.

In the light of the objections relative to whether the subpoenas seek material which could be relevant to any matter before the grand jury, following procedures I have repeatedly followed and have again and again been sustained on, that is, when faced with the question of the materiality or the balancing of equities between the equal importance of considerations on behalf of the witness subpoenaed and considerations on behalf of the grand jury or questions as to the propriety of prosecutorial action as it affects the freedom of the grand jury to proceed or the fundamental functions of the grand jury, I have here also requested and reviewed in-camera affidavits and materials of the grand jury or affidavits reflecting what materials the grand jury has or will be shown, and from these materials and affidavits, which have been impounded for purposes of appeal, or will be by this order, I am satisfied that the subpoenas as to their substance are all reasonable —they are reasonable searches and seizures— that there is a rational relationship or nexus between what they seek and the business of the grand jury.

Further, I am confident that the interests of the subpoenaed witnesses are best served by subpoenas rather than there being an insistance upon them as agents of the Attorney General or as employees of the Attorney General's office to make voluntary disclosures, since to do so may under certain circumstances violate the criminal laws of the State of Illinois.

One of the documents attacked by the movant to the petition and asked to be quashed is titled a "Subpoena Ticket." That, I understand, was served upon a Mrs. Josephine Bonasaga of Springfield, Illinois. It is some sort of form with questionable power under the heading of the Southern District of Illinois. I understand that it has been used from time to time as a sort of notice when there hasn't been time to cause the service of the subpoena. I understand it has been superseded here, however, by a subpoena from this court.

Nevertheless, it is a part of this pleading, it is a part of the documents served upon the witnesses. It isn't worth the paper it is written on. It misinforms and, if relied upon to demand an appearance or produce documents from Mrs. Banasaga, it could not and would not be enforcible by this court. I will strike it and hold it for naught. This is without prejudice to any subpoena properly served upon her, even one setting out, should it set out, the same items recited in this so-called subpoena ticket.

My minor modifications of other subpoenas may be held to read upon any identical items set out in that subpoena, should they be set out in that subpoena, in order that the parties may adjust their responses without further application to this Court for clarification, should they find this possible. As to all the subpoenas the parties are reminded of the caveat, unwritten, which reads into any duces tecum

—a party need not produce what a party does not have. That caveat, however, does not excuse appearance before the grand jury when no documents so specified in a subpoena tecum are possessed by a witness. That caveat, however, cannot do other than protect the witness against the requirement of producing what that witness does not have.

As to the notation on each subpoena, "If you have any questions contact Assistant United States Attorney—" at a given telephone number, that is an appropriation of the Court's order for sending of such personal communication and it will be stricken. This could be a prejudice to the person subpoenaed but under the circumstances here I find no prejudice to the person subpoenaed. This ruling of the Court, however, as has been heretofore indicated in other similar situations, is without prejudice to the attachment with a paperclip of any message which the Assistant U.S. Attorney or the agent working with the case wants to place on the subpoena and it is in the good graces of the United States Marshal if he so chooses to deliver that message along with the subpoena he serves.

As to the subpoena served upon Mr. Herbert Caplan, it is modified by adding the phrase at the end thereof "but excluding any notations or other recordings or record-making of the substance of the conversations engaged in through such telephone calls."

As to Paragraph 3 in the Caplan subpoena, it is modified by adding at the end of said paragraph the following, ". . . but excluding any notations, memoranda or other means used to preserve the substance of the matters and transactions themselves which occurred in such trips, other than the fact thereof and the reason therefor." This exclusion does not exclude the items patricularized in such paragraph.

These identical paragraphs also appear as Paragraphs 3 and 4 respectively of the Zelkoff subpoena and Paragraphs 2 and 3 respectively of the Hammelberg subpoena, and probably, if copied directly from the above-mentioned subpoena ticket, it would appear as Paragraphs 1 and 2 of the Bonasaga subpoena.

The Korthauer subpoena has the same language in Paragraph 1 as the language in Paragraph 2 of the Caplan subpoena, which paragraph is thus amended accordingly.

Paragraph 2 of the Korthauer subpoena in substance is the same except it is worded slightly differently from Paragrah 3 of the Caplan subpoena but it is modified by the adding of the phraseology which I have added on the Caplan subpoena.

With these amendments and modifications thus made the motion to modify is allowed as noted above.

The motion to quash is denied. During argument before me and by indirect reference in briefs attorneys for the movant complain that leakage of information presented to the grand jury was necessary to certain press stories and they necessarily must have occurred in violation of Rule 6 of the Federal Rules of Criminal Procedure. Rule 6 in the traditional as well as statutory secrecy of the grand jury materials and deliberations of the grand jury is the most important rule with relation to grand jury proceedings and offenses against it should be severely handled and persons with information of offenses against Rule 6 should bring that to the attention of the Court.

I have here, however, only vague references and speculative statements with relation thereto. No matter under Rule 6 has formally been presented to me. Wherefore, as to this point I make no other reference at this time. I will consider any of those matters if and when they are presented to me.

Finally, the subpoenas as heretofore modified are returnable by order of this Court made now—what is the date of the next appearance of the grand jury?

MR. MARGOLIS: The next appearance of the grand jury will be one week from today.

THE COURT: Not tomorrow.

MR. MARGOLIS: That is a Wednesday grand jury. They are here now and they will be here next Wednesday.

THE COURT: What is the date?

MR. MARGOLIS: I believe April 12.

THE COURT: (Continuing:)—on April 12 at ten o'clock.

MR. MARGOLIS: Pardon me. If I might, at three o'clock is the time that this case is scheduled before the grand jury, on April 12.

THE COURT: All right, we will make them available at three o'clock.

MR. SULLIVAN: May I point out that I am informed that with regard to the subpoena ticket that you mentioned directed to the witness Bonasaga the actual subpoena contained the title of the Southern District rather than this court, but the same request has been served upon Mrs. Bonasaga and indeed had been served upon her prior to our last appearance before you. That subpoena ticket is not what we rely upon as to her.

THE COURT: All right. Well, that is why I included in my little memorandum that I was modifying that if it did include the phraseology which is in the subpoena ticket.

MR. SULLIVAN: Right. Well, it does.

THE COURT: So you need not return back to me and Dean Herzog need not return back to me on that subpoena if in fact it was so served.

MR. HERZOG: May I respectfully request a stay of the subpoenas. We respectfully disagree here that this order is not appealable. We have a number of cases which show under our research that the order is appealable, because we appear here again for the sovereign State of Illinois; we do not appear here in behalf of the Attorney General as a person against whom an investigation has been conducted and is being conducted.

Under these cases we have we respectfully submit we have the right to appeal this ruling and, therefore, I respectfully ask again, your Honor, that you grant us a stay of the subpoena. Particularly I mention here in this respect the case which you indicated in *Nixon* v. *Sirica* where the order of the district court provided, and I quote:

> "Further ordered that the ruling herein be stayed for a period of five days, in which time respondent may perfect an appeal from the ruling, and it is further ordered that should respondent appeal from the ruling herein the above stay will be extended indefinitely pending the completion of such appeal or appeals."

I again respectfully request you grant us a stay until, first of all, we can digest your ruling, and, secondly, if we desire to appeal, we can take the appeal.

THE COURT: How long did Judge Sirica allow that first stay?

MR. HERZOG: The first he had allowed five days, then he said, "further ordered that should respondent appeal from the ruling herein, the above stay will be extended indefinitely pending the completion of such appeal or appeals."

THE COURT: Let the record indicate that even though I, assuming that I may be in error as to the appealability

of the order, since I did make the subpoenas returnable seven days hence, that it serves the same as a stay. It is not made returnable forthwith, and should an appeal be perfected by that time, then I will grant sufficient stay to allow the Court of Appeals the thirty days which under the statute it has to rule on the appeal.

MR. HERZOG: Thank you, your Honor.

THE COURT: I don't know that there is a special appealability to this because of the State of Illinois or not. You say that there is?

MR. HERZOG: Yes.

THE COURT: Because of its sovereignty?

MR. HERZOG: Yes.

THE COURT: An appealability that would not obtain to a private individual because of its special nature?

MR. HERZOG: Well, it's a third party here, the State of Illinois, as a sovereign, because obviously the employees will not risk contempt procedure—

MR. SULLIVAN: May I point out that the motion to quash or modify was brought by Mr. Scott in his official capacity as Attorney General of the State of Illinois and is signed at the end, "William J. Scott, Attorney General, in his official capacity as a constitutional officer of government of the State of Illinois" and not on behalf of the State of Illinois. In fact, I would be shocked if Governor Thompson would join in this motion. The State of Illinois is not before this Court and I think that what is really happening here is that Mr. Scott has retained counsel and is probably paying out of some department of the State of Illinois to represent himself personally and trying to bring the mantle of state government over him, as he did in this motion which you have denied, but there is no "State of Illinois" even on his papers in front of this Court.

I don't think he has the authority to bring the State of Illinois in here without the Governor's acquiescence.

THE COURT: I would have to research the matter. Illinois is a strange state. The departments are not subordinate departments of the top executive, and in many instances I do recall from the olden days in the corporation counsel's office even the governor didn't have some powers that the attorney general had/has as the attorney for the state.

He is elected independently, and occasionally one is of one party and the other is of the other.

I'm not sure. I really don't know. That is a question that is interesting to research. Under Illinois law this structure of the executive branch, of execuutive responsibility, sort of defies quick evaluation.

MR. SULLIVAN: That is true. I am just pointing out that on his own papers he doesn't assert the state is here, he asserts he is here in his capacity, and I now quote, ". . . as attorney general of the State of Illinois."

THE COURT: There are pleadings in civil proceedings where the attorney general proceeds as "The State of Illinois vs. —" In criminal proceeding, of course, the state's attorney proceeds invariably as "The People of the State of Illinois —" It is still quite mixed up.

MR. HERZOG: May I answer that, your Honor?

THE COURT: Yes.

MR. HERZOG: If the distinguished United States District Attorney would have read our brief—

MR. SULLIVAN: I read it.

MR. HERZOG: Well, then you forgot.

MR. SULLIVAN: The important thing is the moving papers.

MR. HERZOG: The important thing is that he files this brief and his motion in his official capacity as the Attorney General of the State of Illinois.

MR. SULLIVAN: That's what I just got through saying.

MR. HERZOG: Not as an individual, as an official officer of the State of Illionis under the Constitution as well as under a whole range of cases going back to *Fergusson* v. *Russell;* he has here not merely the authority but the obligation to represent the interests of the state, and only the attorney general and nobody else is mentioned by the Illinois Supreme Court as in *Fergusson* v. *Russell,* in *Stein* v. *Howlett*—I can go on and on, and the attorney general v. the racing board, because, after all, I argued that case. So I know a little bit about these cases.

MR. SULLIVAN: I agree with what he says but it is irrelevant to the point. He is here trying to protect himself.

MR. HERZOG: No.

MR. SULLIVAN: The attorney general, he titles this thing as in the official capacity of attorney general, but that does not mean that he is here on behalf of the State of Illinois. He doesn't say he is here on behalf of the State of Illinois.

I say he has no authority to bring the State of Illinois in here. Let Governor Thompson come in here—

MR HERZOG: Governor Thompson has no right here. He has to proceed through the attorney general. That is why I tried to emphasize and to impress upon you, and I wish you would read the cases of *Fergusson* v. *Russell* and—

MR. SULLIVAN: I am familiar with that law and I accept it.

MR. HERZOG: Then you have forgotten. I don't want to engage in a discussion about the merits with you. I can only say that the only representative, the only authorized legal representative of the sovereignty of the State of Illinois is the attorney general, and if a person wishes to represent of State of Illinois he has to get the approval of the attorney general.

MR. SULLIVAN: This is so irrelevant that it is painful, your Honor. It is just irrelevant.

MR. HERZOG: It might be relevant for you if you have engaged in a fishing expedition as far as the State of Illinois is concerned, but it is not irrelevant to the people of the State of Illinois, particularly if they have to pay the costs for your fishing expedition.

MR. SULLIVAN: I resent that. They have to pay the fees in order to protect Mr. Scott. Then the people are involved here.

MR. HERZOG: Never mind my fees.

THE COURT: I do not know who is representing whom, whether it is personal; I have to take it as I find it in the pleadings. I have to give those pleadings the benefit of a doubt, particularly in light of the admonition under Rule 11 of the Rules of Civil Procedure, which provides, of course, the allegations of the complaint, when signed by the lawyer, are verified really by the lawyer. He puts his stamp of approval behind them.

So I have to accept them on their face. If he states that he does this on behalf of the office of the attorney general, I would assume, unless a motion were made to quash it on the ground that he didn't have authority to do it, that he does, I don't know, but for the purposes of my ruling it would not matter one way or the other.

The subpoenas are good wherever they may go under these circumstances as I have found, both with relation to the question of sovereignty, state sovereignty, and the question of lawyer-client privilege.

MR. SULLIVAN: Your Honor, we will ask your court reporter to type up your remarks so that we may advise the subpoenaed persons of the modifications to the subpoenas.

THE COURT: Yes. That will save my minute clerk also the necessity of putting word-for-word what I said down. All right. Thank you, gentlemen.

MR. SULLIVAN: Thank you, your Honor.

MR. HERZOG: Thank you, your Honor.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re.

THE SPECIAL APRIL 1977 GRAND JURY } No. 77 GJ 2042

CERTIFICATE

I HEREBY CERTIFY that I reported in shorthand the proceedings had in the above-entitled cause, before the HON. JAMES B. PARSONS, Chief Judge of said Court, on April 5, 1978, and that the foregoing transcript is a true, correct and complete transcript of my original and official shorthand notes so taken as aforesaid.

S/JOSEPH R. BETZ,
Official Court Reporter,
United States District Court,
Northern District of Illinois,
Eastern Division.

APPENDIX B

APPENDIX B

UNITED STATES CONSTITUTION, ARTICLE III, SECTION 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State;— between citizens of differing States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

UNITED STATES CONSTITUTION, 10TH AMENDMENT:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(Ratified December 15, 1791.)

ILLINOIS CONSTITUTION OF 1970—ARTICLE V, SECTIONS 1 AND 15:

THE EXECUTIVE

Section 1. OFFICERS

The Executive Branch shall include a Governor, Lieutenant Governor, Attorney General, Secretary of State, Comptroller and Treasurer elected by the electors of the State. They shall keep the public records and maintain a residence at the seat of government during their terms of office.

Section 15. ATTORNEY GENERAL—DUTIES

The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law.

STATUTES OF THE UNITED STATES

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 17(c):

For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 27:

PROOF OF OFFICIAL RECORD

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 44(a)(1):

PROOF OF OFFICIAL RECORD

(a) Authentication.

(1) *Domestic.* An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

FEDERAL RULES OF EVIDENCE, RULE 902 SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United

States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publication. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

28 USCA, Section 1739:

State and Territorial nonjudicial records; full faith and credit

All nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, shall be proved or ad-

mitted in any court or office in any other State, Territory, or Possession by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or Possession in which it is made.

Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken.

Ill. Rev. Stat. (1977) ch. 15 § 303-2:

§ 3-2. **Mandatory and directed post audits.)** The Auditor General shall conduct a financial audit of each State agency at least once during every biennium, except as is otherwise provided in regulations adopted under Section 3-8. In the conduct of financial audits, the Auditor General may inquire into and report upon matters properly within the scope of a management or program audit, provided that such inquiry shall be limited to matters arising during the ordinary course of the financial audit.

The Auditor General shall conduct a management or program audit of a State agency when so directed

by the Commission, or by either house of the General Assembly, in a resolution identifying the subject, parties and scope. Such a directing resolution may:

(a) require the Auditor General to examine and report upon specific management efficiencies or cost effectiveness proposals specified therein;

(b) in the case of a program audit, set forth specific program objectives, responsibilities or duties or may specify the program performance standards or program evaluation standards to be the basis of the program audit;

(c) be directed at particular procedures or functions established by statute, by administrative regulation or by precedent;

(d) require the Auditor General to examine and report upon specific proposals relating to state programs specified in the resolution.

The Commission may by resolution clarify, further direct, or limit the scope of any audit directed by a resolution of the House or Senate, provided that any such action by the Commission must be consistent with the terms of the directing resolution.

The Auditor General shall conduct such post audits as are required as a condition of grants to State agencies by the federal government or any agency thereof if the cost of those audits is reimbursed to the State by the federal government or is reimbursable from federal funds, or, if not on such a reimbursement basis, with the approval of the Commission. Such post audits may be conducted only within the limitations and standards established by this Act or within the terms of regulations adopted pursuant to this Act.

Illinois State Records Act—Ill. Rev. Stat. 1977, Ch. 116, §§ 43.4-43.28:

STATE RECORDS ACT

AN ACT relating to State records, providing for a State Archives division of the office of Secretary of State, creating the State Records Commission and defining its powers and duties, providing for a continuing records and paperwork management program and repealing an Act therein named.

Be it enacted by the People of the State of Illinois represented in the General Assembly:

43.4 Title.] § 1. This Act shall be known as "The State Records Act."

43.5 Definitions.] § 2. For the purposes of this Act:

"Secretary" means Secretary of State.

"Record" or "records" means all books, papers, maps, photographs, or other official documentary materials, regardless of physical form or characteristics, made, produced, executed or received by any agency in the State in pursuance of state law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its successor as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the State or of the State Government, or because of the informational data contained therein. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included within the definition of records as used in this Act.

"Agency" means all parts, boards, and commissions of the executive branch of the State government including but not limited to all departments established by the "Civil Administrative Code of Illinois." as heretofore or hereafter amended.

"Public Officer" or "public officers" means all officers of the executive branch of the State government, all officers created by the "Civil Administrative Code of Illinois," as heretofore or hereafter amended,[1] and all other officers and heads, presidents, or chairmen of boards, commissions, and agencies of the State government.

"Commission" means the State Records Commission.

"Archivist" means the Secretary of State.

43.6 Reports and records of obligation, receipt and use of public funds as public records.] § 3. Reports and records of the obligation, receipt and use of public funds of the State are public records available for inspection by the public. These records shall be kept at the official place of business of the State or at a designated place of business of the State. These records shall be available for public inspection during regular office hours except when in immediate use by persons exercising official duties which require the use of those records. The person in charge of such records may require a notice in writing to be submitted 24 hours prior to inspection and may require that such notice specify which records are to be inspected. Nothing in this section shall require the State to invade or assist in the invasion of any person's right to privacy. Nothing in this Section shall be construed to limit any right given by statute or rule of law with respect to the inspection of other types of records.

Warrants and vouchers in the keeping of the State Comptoller may be destroyed by him as authorized in "An Act in relation to the reproduction and destruction of records kept by the Comptroller", approved August 1, 1949, as now or hereafter amended.[1]

43.7 Right of access by public—Reproductions—Fees.] § 4. Any person shall have the right of access

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1. Chapter 127, § 1 et seq.

1. Chapter 15, § 25 et seq.

to any public records of the expenditure or receipt of public funds as defined in Section 3[1] for the purpose of obtaining copies of the same or of making photographs of the same while in the possession, custody and control of the lawful custodian thereof, or his authorized deputy. The photographing shall be done under the supervision of the lawful custodian of said records, who has the right to adopt and enforce reasonable rules governing such work. The work of photographing shall, when possible, be done in the room where the records, documents or instruments are kept. However, if in the judgment of the lawful custodian of the records, documents or instruments, it would be impossible or impracticable to perform the work in the room in which the records, documents or instruments are kept, the work shall be done in some other room or place as nearly adjacent as possible to the room where kept. Where the providing of a separate room or place is necessary, the expense of providing for the same shall be borne by the person or persons desiring to photograph the records, documents or instruments. The lawful custodian of the records, documents or instruments may charge the same fee for the services rendered by him or his assistant in supervising the photographing as may be charged for furnishing a certified copy or copies of the said record, document or instrument. In the event that the lawful custodian of said records shall deem it advisable in his judgment to furnish photographs of such public records, instruments or documents in lieu of allowing the same to be photographed, then in such event he may furnish photographs of such records and charge a fee of 35c per page when the page to be photographed does not exceed legal size and $1.00 per page when the page to be photographed exceeds legal size and where the fees and charges therefor are not otherwise fixed by law.

43.8 State Archives Division—Creation.] § 5. The Secretary of State shall provide for a State Archives

1. Section 43.6 of this chapter.

Division as a repository of State records. The State Archives may utilize space in the Archives Building or other building as may be necessary or appropriate for the purpose, in the opinion of the Secretary of State.

43.9 Secretary of State to be State Archivist—Assistants.] § 6. The Secretary of State shall be the State Archivist and Records Administrator and he shall appoint such assistants, who shall be technically qualified and experienced in the control and management of archival materials and in records management practices and techniques, as are necessary to carry out his duties as State Archivist.

43.10 Powers and duties.] § 7. The Secretary:

(1) whenever it appears to him to be in the public interest, may accept for deposit in the State Archives the records of any agency or of the Legislative or Judicial branches of the State government that are determined by him to have sufficient historical or other value to warrant the permanent preservation of such records by the State of Illinois;

(2) may accept for deposit in the State Archives official papers, drawings, maps, writings, and records of every description of counties, municipal corporations, political subdivisions and courts of this State, and records of the federal government pertaining to Illinois, when such materials are deemed by the Secretary to have sufficient historical or other value to warrant their continued preservation by the State of Illinois.

(3) whenever he deems it in the public interest, may accept for deposit in the State Archives motion picture films, still pictures, and sound recordings that are appropriate for preservation by the State government as evidence of its organization, functions and policies.

(4) shall be responsible for the custody, use, servicing and withdrawal of records transferred for deposit in the State Archives. The Secretary shall observe any rights, limitations, or restrictions imposed by law relating to the use of records, but he shall not impose

restrictions or limitations on the use of records that are defined by law as public records or as records open to public inspection;

(5) shall make provision for the preservation, arrangement, repair, and rehabilitation, duplication and reproduction, description, and exhibition of records deposited in the State Archives as may be needed or appropriate;

(6) shall make or reproduce and furnish upon demand authenticated or unauthenticated copies of any of the documents, photographic material or other records deposited in the State Archives, the public examination of which is not prohibited by statutory limitations or restrictions or protected by copyright. The Secretary shall charge a fee therefor in accordance with the schedule of fees in Section 10 of "An Act concerning fees and salaries, and to classify the several counties of this state with reference thereto," approved March 29, 1872, as amended,[1] except that there shall be no charge for making or authentication of such copies or reproductions furnished to any department or agency of the State for official use. When any such copy or reproduction is authenticated by the Great Seal of the State of Illinois and is certified by the Secretary, or in his name by his authorized representative, such copy or reproduction shall be admitted in evidence as if it were the original.

(7) any official of the State of Illinois may turn over to the Secretary of State, with his consent, for permanent preservation in the State Archives, any official books, records, documents, original papers, or files, not in current use in his office, taking a receipt therefor.

43.11 Preservation of records.] § 8. The head of each agency shall cause to be made and preserved records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency de-

1. Chapter 53, § 24.

signed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities.

This section shall not be construed to prevent the legal disposal of any records determined by the agency and by the Commission not to have sufficient value to warrant their continued preservation by the State or by the agency concerned.

43.12 Programs for efficient management of records.] § 9. The head of each agency shall establish, and maintain an active, continuing program for the economical and efficient management of the records of the agency.

Such program:

(1) shall provide for effective controls over the creation, maintenance, and use of records in the conduct of current business;

(2) shall provide for cooperation with the Secretary in applying standards, procedures, and techniques to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value;

(3) shall provide for compliance with the provisions of this Act and the rules and regulations issued thereunder.

43.13 Transfer of agency records.] § 10. Whenever the head of an agency determines that substantial economies or increased operating efficiency can be effected thereby, he may, subject to the approval of the Secretary, provide for the storage, care, and servicing of records that are appropriate therefore in a records center operated and maintained by the Secretary.

43.14 Records not to be damaged or destroyed.] § 11. All records made or received by or under the authority of or coming into the custody, control or possession of public officials of this State in the course of

their public duties are the property of the State and shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part except as provided by law.

43.15 Surveys of management and disposal practices.] § 12. The Secretary shall make continuing surveys of State records management and disposal practices and obtain reports thereon from agencies.

43.16 Improvement of management practices and security of records.] § 13. The Secretary, with due regard to the program activities of the agencies concerned, shall make provision for the economical and efficient management of records of State agencies by analyzing, developing, promoting, coordinating, and promulgating standards, procedures, and techniques designed to improve the management of records, to insure the maintenance and security of records deemed appropriate for preservation, and to facilitate the segregation and disposal of records of temporary value. The Secretary shall aid also in promoting the efficient and economical utilization of space, equipment, and supplies needed for the purpose of creating, maintaining, storing, and servicing records.

43.17 Standards for retention.] § 14. The Secretary shall establish standards for the selective retention of records of continuing value and assist agencies in applying such standards to records in their custody.

43.18 Records centers.] § 15. The Secretary shall establish, maintain, and operate records centers for the storage, care, and servicing of records of State agencies pending their deposit in the State Archives or the disposition of such records in any other manner authorized by law. The Secretary may establish, maintain, and operate centralized microfilming services for agencies.

43.18a System for protection and preservation of records—Establishment.] § 15a. The Secretary of

State, and State Archivist, shall establish a system for the protection and preservation of essential State records necessary for the continuity of governmental functions in the event of an emergency arising from enemy action or natural disaster and for the reestablishment of State government thereafter.

43.18b Records essential for emergency government operation—Determination.] § 15b. The Secretary shall:

(1) Determine what records are "essential" for emergency government operation through consultation with all branches of government, State agencies, and with the State Civil Defense Agency.

(2) Determine what records are "essential" for post-emergency government operations and provide for their protection and preservation.

(3) Establish the manner in which essential records for emergency and post-emergency government operations shall be preserved to insure emergency useability.

(4) Require every State agency to establish and maintain an essential records preservation program.

(5) Provide for security storage or relocation of essential State records in the event of an emergency arising from enemy attack or natural disaster.

43.19 State Records Commission—Membership—Meetings—Duties.] § 16. There is created the State Records Commission. The Commission shall consist of the following members: The Secretary of State, or his representative, who shall act as chairman; the State Historian, who shall serve as secretary; the State Treasurer, or his authorized representative; the Director of Finance, or his authorized representative; the Attorney General, or his authorized representative; and the State Comptroller, or his authorized representative. The Commission shall meet whenever called

by the chairman, who shall have no vote on matters considered by the Commission. It shall be the duty of the Commission to determine what records no longer have any administrative, legal, research, or historical value and should be destroyed or disposed of otherwise.

43.20 Disposal and reproduction of records—Regulations.] § 17. Regardless of other authorization to the contrary, no record shall be disposed of by any agency of the State, unless approval of the State Records Commission is first obtained. The Commission shall issue regulations, not inconsistent with this Act, which shall be binding on all agencies. Such regulations shall establish procedures for compiling and submitting to the Commission lists and schedules of records proposed for disposal; procedures for the physical destruction or other disposition of records proposed for disposal; and standards for the reproduction of records by photography or microphotographic processes with the view to the disposal of the original records. Such standards shall relate to the quality of film used, preparation of the records for filming, proper identification matter on the records so that an individual document or series of documents can be located on the film with reasonable facility, and that the copies contain all significant record detail, to the end that the photographic or microphotographic copies will be adequate.

Such regulations shall also provide that the State archivist may retain any records which the Commission has authorized to be destroyed, where they have a historical value, and that the State archivist may deposit them in the State Library or State historical museum or with a historical society, museum or library.

43.21 Reports and schedules to be submitted by agency heads.] § 18. The head of each agency shall submit to the Commission, in accordance with the regulations of the Commission, lists or schedules of records in his custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal or fiscal value to warrant their further preservation. The head of each agency also shall submit lists or schedules proposing the length of time each record series warrants retention for administrative, legal or fiscal purposes after it has been received by the agency.

43.22 Disposition of reports and schedules.] § 19. All lists and schedules submitted to the Commission shall be referred to the Archivist who shall ascertain whether the records proposed for disposal have value to other agencies of the State or whether such records have research or historical value. The Archivist shall submit such lists and schedules with his recommendations in writing to the Commission; and the final disposition of such records shall be according to the orders of the Commission.

43.23 Destruction of non-record materials.] § 20. Nonrecord materials or materials not included within the definition of records as contained in this Act may be destroyed at any time by the agency in possession of such materials without the prior approval of the Commission. The Commission may formulate advisory procedures and interpretation to guide in the disposition of non-record materials.

43.24 Disposal of records—Consent of agency head.] § 21. The Archivist shall submit to the Commission, with his recommendations in writing, disposal lists of records that have been deposited in the State Archives as provided in subsections (1), (2), and (3) of Section 7 of this Act,[1] after having determined that the records concerned do not have sufficient value to warrant their continued preservation by the State. However, any records deposited in the State Archives by any agency pursuant to the provisions of subsection (1)

1. Section 43.10 of this chapter.

of Section 7 of this Act shall not be submitted to the Commission for disposal without the written consent of the head of such agency.

43.25 Disposition of records of terminated state agency.] § 22. Upon the termination of any State agency whose function or functions have not been transferred to another agency, the records of such termi nated agency shall be deposited in the State Archives. The Commission shall determine which records are of sufficient legal, historical, administrative, or fiscal value to warrant their continued preservation by the State. Records that are determined to be of insufficient value to warrant their continued preservation shall be disposed of as provided in Section 17 of this Act.[1]

43.26 Repeal—Saving clause.] § 23. "An Act creating the State Records Commission and defining its powers and duties," approved July 23, 1943, as amended, is repealed,[1] but all orders heretofore issued by the State Records Commission created by said Act shall stand and continue to be in full force and effect.

43.27 Penalty for violation.] § 24. Any officer or employee who violates the provisions of Section 3 of this Act[1] is guilty of a Class B misdemeanor.

43.28 Partial invalidity.] § 25. The invalidity of any section or part or portion of this act shall not affect the validity of the remaining sections or parts thereof.

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1. Section 43.20 of this chapter.

1. Sections 39-43.3 of this chapter.

1. Chapter 116, § 43.6.